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# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No. 527

UNITED FUEL GAS COMPANY, APPELLANT

*v.*

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA

---

*ON APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA*

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**MEMORANDUM FOR THE UNITED STATES AND FEDERAL POWER COMMISSION, AMICI CURIAE**

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The present appeal is from a judgment of the Supreme Court of Appeals of the State of West Virginia, entered on May 20, 1963, and amended on May 29, 1963, denying appellant's petition for review of final orders of the Public Service Commission of West Virginia.

The Solicitor General, pursuant to this Court's order of December 16, 1963, submits this memorandum setting forth the government's views on the issues presented in the appellant's jurisdictional statement.

## QUESTIONS PRESENTED

1. Has the appellant, United Fuel Gas Company, raised any substantial federal question under the Supremacy Clause, the Commerce Clause, or the Due Process Clause by showing that the Public Service Commission of West Virginia, in developing and establishing rates for the portions of appellant's utility business subject to State jurisdiction, employed a rate-making technique different from the technique used by the Federal Power Commission in evaluating and approving appellant's rates for portions of its business subject to federal jurisdiction.

2. Has appellant demonstrated any conflict between the orders of the Public Service Commission of West Virginia and Section 167 of the Internal Revenue Code; did that Commission misapprehend Revenue Procedure 62–21 issued under Section 167?

## STATEMENT

The appellant, United Fuel Gas Company (United Fuel), sells natural gas in West Virginia and in other States. Substantially all of its sales, except those at retail in West Virginia, are made in interstate commerce for resale, at rates approved by the Federal Power Commission pursuant to the Natural Gas Act, 15 U.S.C. 717–717w. The retail sales in West Virginia are made at rates approved by the Public Service Commission of West Virginia pursuant to Sections 2553–2556 of the West Virginia Code of 1961 (Michie's).

Both the Federal Power Commission and the West Virginia Commission rely on cost-of-service studies

in fixing rates designed to meet the standards of their respective statutes.[1] Cost-of-service reflects the regulated company's entire cost of doing business. In addition to direct expenses for such items as labor, purchased gas, taxes, and maintenance, the company is also allowed a return of capital through depreciation charges and a return on the unrecouped capital which is derived by the application of a fair rate of return to the company's prudent-investment rate base.

When a company uses the same facilities—as does United Fuel—to render services regulated by more than one jurisdiction, it becomes necessary for the respective regulatory commissions to determine what portion of the company's total cost of service is related to the service rendered in their respective jurisdictions. *Minnesota Rate Cases*, 230 U.S. 352, 435. In the case of natural gas pipeline companies, it has long been the practice to make this determination by allocation of costs. *Colorado Interstate Gas Company* v. *Federal Power Commission*, 324 U.S. 581, 586. No jurisdictional line is drawn across the physical properties themselves; rather, the costs are allocated on the basis of the ratio of jurisdictional service to the total service rendered.

Before such an allocation is possible, however, it is necessary to classify costs in order to associate them with the type of service rendered. For this purpose, service is normally considered to be of two types—

[1] "Just and reasonable," Natural Gas Act, Section 4(a); 15 U.S.C. 717c(a); "Reasonable," West Virginia Code of 1961 (Michie's), Section 2555.

peaking and annual. The distinction results from the fact that although two customers may take exactly the same amount of gas on an annual basis, one may be willing to be "cut off" (or be denied gas) during the peak periods of demand on the pipeline, while the other may be in particular need of gas at that time.[2] In order to be assured of peaking service, a customer pays what is known as a demand charge. In addition, all customers pay a commodity charge based upon the total amount of gas they consume. For the purpose of computing these charges, certain cost items are classified as demand costs, others as commodity costs; still others are classified as both commodity and demand, usually on a fifty-fifty basis.

Once the company's total costs have been classified as demand or commodity, jurisdictional allocations may be made within each classification. Demand costs are allocated among those customers who receive gas during the peak period, in proportion to each customer's purchases during that period. Commodity costs are allocated among all customers on the basis of their relative annual purchases.

It is the problem of cost classification which gives rise to the first of the two issues raised by the present appeal. United Fuel pays an affiliated company, Columbia Gulf Transmission Company, to transport gas owned by United Fuel from the Southwest (where it is produced) to the beginning of

[2] Typically, householders or commercial establishments will need to be assured that they can have maximum amounts of gas on the coldest winter days, while industrial users can switch to other fuels or close down their plants in such periods.

United Fuel's own transmission line. The Federal Power Commission, for the purpose of evaluating and approving a settlement with respect to United Fuel's interstate wholesale cost-of-service, has classified this transportation expense half to demand and half to commodity. Since during the test period used by the Federal Power Commission (the 12 months ended March 31, 1960) the interstate wholesale customers took 90.424% of United Fuel's annual gas volumes but only 88.274% of the peak period volumes,[3a] the classification of Columbia Gulf's transportation costs half to demand and half to commodity means that the interstate customers pay rates reflecting 89.3% of the test period Columbia Gulf expense.[3b]

The West Virginia Commission, on the other hand, classified the entire Columbia Gulf expense to commodity. Since the annual intrastate retail sales subject to regulation by the West Virginia Commission amounted to only 8% of United Fuel's total 1961 sales, the effect of this determination was to set the intrastate retail rates at a level calculated to recover only about 8% of Columbia Gulf's 1961 costs. The fact that some 12½% of United Fuel's peak period sales were to intrastate retail customers was thus not fully reflected in the rate set by the West Virginia Commission. It is this failure of the West Virginia

[3] Columbia Gulf, which, like United Fuel, is wholly-owned by the Columbia Gas System, has no function other than to transport gas for United Fuel.

[3a] 27 FPC at 544, line 10.

[3b] Cf. Jur. St., p. 6, where appellant mistakenly assumes that the interstate rates recoup 89.5% of the 1961 test period Columbia Gulf expense.

Commission to fix retail rates for United Fuel reflecting a classification of Columbia Gulf costs complementing that reflected by the wholesale rates fixed by the Federal Power Commission which forms the basis of appellant's first allegation of error.

The other issue is unrelated to any action by the Federal Power Commission[4] and stems from the issuance by the United States Department of the Treasury in 1962 of a document entitled Depreciation Guidelines and Rules (Rev. Proc. 62–21 (1962)), which listed for the natural gas pipeline industry, among others, the number of years which the Treasury indicated it might consider appropriate in determining the "useful lives" of various types of equipment for purposes of the depreciation provisions of Section 167 of the Internal Revenue Code. The useful lives so listed were shorter than those which the Treasury had previously indicated would be appropriate. Shorter lives mean more rapid depreciation. Thus, use of Guideline lives means higher depreciation charges, a correspondingly higher tax deduction for depreciation expense, and, as a result, a lower tax liability. These "Guideline lives" were not mandatory (Jur. St., p. 10c), and, while the Treasury announced that any taxpayer could utilize them without challenge for a period of three years, their subsequent use was to depend upon the taxpayer's actual replacement practice (*ibid.*).

[4] A related question as to the regulatory treatment of a company failing to avail itself of the Treasury Guidelines is now pending before the Federal Power Commission. The Commission expresses no view on this question. The opinions stated on Question 2 are those of the Solicitor General.

The West Virginia Commission, in fixing the federal income tax component of the cost-of-service for United Fuel, allowed a sum for the company's taxes based upon what the company would pay if it chose to utilize the Guideline useful life figures for its property. It did so despite the fact that United Fuel's witness had testified that the company had not decided whether to utilize the then newly-promulgated Guideline lives in lieu of the longer lives upon which it had hitherto calculated deprecation for tax purposes (R. 591). The position of the West Virginia Commission was (1) that a regulated utility is bound "to take advantage of all reasonable economies in the operation of its business and to pass on the savings therefrom to its customers," and (2) that United Fuel had failed to indicate that the use of Guideline lives would adversely affect the company (Jur. St., p. 16b). This determination is challenged by the appellant as being in conflict with Section 167 of the Internal Revenue Code and the Treasury Regulations promulgated thereunder.

DISCUSSION

1. Appellant challenges on three grounds the West Virginia Commission's failure to adopt a cost classification technique complementary to that which was utilized by the Federal Power Commission in approving appellant's interestate rate settlement, alleging that the State's determination (1) conflicts with the Supremacy Clause of Article VI of the United States Constitution; (2) constitutes an undue burden on inter-

state commerce, and (3) deprives appellant of its property without due process of law.

A. The contention that the West Virginia Commission is bound by the Supremacy Clause to follow the determinations of the Federal Power Commission with respect to the classification of particular costs incurred by a natural gas company in performing services subject to regulation by both agencies misconceives the regulatory scheme established by Congress in the Natural Gas Act. That enactment clearly distinguished between the areas of federal and State regulation. The Federal Power Commission was to have jurisdiction over the transportation and sale for resale of natural gas in interstate commerce; in all other areas—which, of course, embraces sales at retail—the States were to retain authority. The Shreveport Doctrine (see *Houston, East and West Texas Railway Co.* v. *United States,* 234 U.S. 342) was not written into the Natural Gas Act.

Since many natural gas companies have services falling within both the federal and State domains, disparities in the regulatory treatment of various facets of a company's business are a common occurrence. Thus the Federal Power Commission determines the rate base of natural gas companies on an original-cost-less-depreciation basis (see *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U.S. 591), whereas a number of States still adhere to "fair value" concepts (see Federal Power Commission, *State Commission Jurisdiction and Regulation of Electric and Gas Utilities,*

1960, p. 8). Similarly, the rate of return allowed by State Commissions in fixing intrastate retail rates often varies from that deemed appropriate by the Power Commission in prescribing the interstate wholesale rates of the same company.

Such deviations from the federal methods have never been thought offensive to the Supremacy Clause merely because the end result is that the company's total revenue will be less than if the federal example had been followed. The reason is that no federal statute directs how intrastate rates are to be regulated.

The situation presented here is essentially the same. The problem of determining what portion of a company's facilities or costs are properly assignable to its operations subject to federal regulation and what portion to those subject to State regulation is a difficult one. Nothing in the federal statute directs a State agency how to make cost allocations on matters within its jurisdiction.

The desirability of avoiding inconsistency in allocations makes the problem appropriate for joint federal-State cooperation. Thus in the communications field the Federal Communications Commission and the National Association of Railroad and Utility Commissioners ("NARUC") have agreed upon a "Separations Manual" which is usually, but not invariably, followed by the Communications Commission and the State agencies. See, *e.g., Re New England Telephone & Telegraph Company,* 97 PUR (NS) 410, 417 (New Hampshire Public Utilities Commission, 1952); *Re New York Telephone Company,* 91 PUR (NS) 231, 244 (New York Public Service Com-

mission, 1951). A similar joint effort has been initiated in the gas and electric power fields between the Federal Power Commission and NARUC. See Federal Power Commission, Forty-Second Annual Report, 1962, p. 76. But while uniformity may be advantageous as a matter of regulatory policy, diversity is not precluded by any principle of federal supremacy.

If the Federal Power Commission had asserted jurisdiction over a natural gas company or some of its operations pursuant to the procedures established by the Natural Gas Act (which provide for participation before the Commission and in subsequent court review by interested States or State agencies[5]), a State's attempt to compel a different course of action would raise questions under the Supremacy Clause. But here there is no dispute between the Federal Power Commission and the West Virginia Public Service Commission as to anything within either of their respective areas of responsibility over United Fuel's operations, and appellant does not suggest that either Commission is overstepping its jurisdictional bounds. The claim is solely that West Virginia, in performing a task admittedly within its jurisdiction, has failed to follow the methods utilized by the Federal Power Commission in carrying out its assigned task, and that this has resulted in United Fuel's recovering less than its full costs on an item of joint interest to the two agencies. Assuming, *arguendo*, that this indicates that one of the two agencies erred, it does not raise a question of federal supremacy be-

[5] See Natural Gas Act, Sections 4(e), 5(a) and 15(a), 15 U.S.C. 717c(e), 717d(a) and 717n(a).

cause neither the federal statute nor the federal agency lays down a mandate concerning the operations of the State agency.[6]

B. Nor do we agree with appellant's claim that the action of the West Virginia Commission constitutes an impermissible burden on interstate com-

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[6] The federal cost classification which appellant alleges was binding upon the West Virginia Commission was not even the product of any considered determination of that issue by the Federal Power Commission. The last formal Commission determination of United Fuel's interstate rates was in August, 1953, prior to the construction of Columbia Gulf's transmission facilities. *In the Matter of United Fuel Gas Co.*, 12 FPC 251; *cf. In the Matter of Gulf Interstate Gas Co.* 12 FPC 116. Since that time United Fuel's interstate wholesale rates have been determined as a result of rate settlements, the last of which, approved March 20, 1962, established United Fuel's present rates. See *United Fuel Gas Co.*, 27 FPC 538. While that order contains, as an Appendix A, a stipulated cost of service used for settlement purposes which reflects the classification of Columbia Gulf's transmission costs half to demand and half to commodity (27 FPC at 542, see, *e.g.*, line 29), the order also contains a statement that it is "without prejudice to claims or contentions which may be made by the Commission, United Fuel, the Commission staff, *or any affected party herein*, in any proceeding now pending or hereafter instituted by or against United Fuel." (*id.* at 541, emphasis added.) Significantly, the West Virginia Commission was a party to the Commission proceeding and to the settlement, and the West Virginia Commission had previously determined that the Columbia Gulf costs should be allocated 100% to commodity. Re *United Fuel Gas Company*, 27 PUR 3d 365, 375 (West Virginia Public Service Commission, 1959).

It seems clear, therefore (as appellant's witness recognized in the hearing before the West Virginia Commission, R. 126), that the Federal Power Commission has never expressly determined that the Columbia Gulf costs should be split between demand and commodity, and that West Virginia cannot be said to be bound by the details of the cost-of-service attached to the Federal Power Commission's settlement order.

merce. There may well be circumstances in which a State's action, otherwise within its proper sphere of jurisdiction, so impairs the ability of a natural gas company to carry out operations in interstate commerce that a substantial federal question is presented. Cf. *e.g., Northern Natural Gas Co.* v. *Kansas Commission,* 372 U.S. 84. But here there is no showing that this is the case. Cf. *Narragansett Electric Company* v. *Kennelly,* 143 A. 2d 709, 723 (Rhode Island Supreme Court, 1958). Certainly, the mere fact that United Fuel will derive lower gross revenues on the intrastate retail portion of its business than would have been the case if the West Virginia Commission had followed the Federal Power Commission's classification of the Columbia Gulf Transportation costs does not indicate that appellant's overall financial position will be significantly impaired, or that there would be any basis for seeking higher interstate rates. Where a State discriminates between intrastate and interstate concerns, or where, as in the *Northern* case, *supra,* the direct effect of the State action would be to change the gas purchasing patterns of the interstate pipelines, this Court may find it necessary to consider the substantiality of the burden the State action imposes on interstate commerce. But it obviously cannot be presumed that any State measure which limits the revenues from intrastate business of a company which also does an interstate business constitutes a burden on interstate commerce. There must be a demonstrable impact.

C. Finally, appellant invokes the Due Process clause, alleging that the West Virginia Commission's action was confiscatory. This Court has consistently

held that in rate cases this issue must be examined solely in terms of the validity of the end result—the rates themselves—and that it will not go behind a rate to examine the ratemaking techniques or methods used in its derivation. See *Los Angeles Gas and Electric Corp.* v. *Railroad Commission*, 289 U.S. 287, 304–305; *West Ohio Gas Co.* v. *Commission*, 294 U.S. 63, 70; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602; *West* v. *Chesapeake & Potomac Telephone Co.*, 295 U.S. 662, 692–693 (dissenting opinion).

Here there is no claim that the rates set by the West Virginia Commission, considered by themselves, were confiscatory, or even that the classification method adopted by the State Commission was inherently unlawful. Nor is there a showing that the combined action of the State and federal commissions resulted in rates which prevented the company from recovering its costs or even from earning a fair return on its investment. United Fuel claimed merely that the resulting rates would yield it $800,000[7] less than it would have earned had the two commissions utilized the same method in classifying the Columbia Gulf expense. Since the company's rate base, as deter-

[7] The record does not support the $800,000 figure used by appellant (Jur. St., pp. 6-7). That figure assumes that United's interstate wholesale rates would recover only the same percentage of its payments to Columbia Gulf for gas transportation during 1961 (the West Virginia Commission's test year) as test year used in the settlement approved by the Power Com- during the earlier 12-month period ending March 31, 1960 (the test year used in the settlement approved by the Power Commission). If Columbia Gulf's costs have declined with the passage of time, as we believe they have, such an assumption is wholly unwarranted.

mined by the West Virginia Commission in the proceedings at issue here was $192,769,091 (R. 399), an annual reduction of $800,000 in gross revenues (or roughly $400,000 of revenue after taxes) is the approximate equivalent of a reduction of .2 of a percentage point in the rate of return.[8] The rates established by the Federal Power Commission, applicable to some 92% of the company's annual sales, were predicated upon a rate of return of 6.44%;[8a] the State Commission allowed 6%;[8b] and the weighted average of the two rates is 6.40%. Thus the net effect of the claimed $800,000 deficiency would have been to lower United Fuel's overall rate of return from 6.40% to 6.20%. In the absence of any showing that such a rate of return is not within the zone of reasonableness, the charge of confiscation must fail.

2. The second issue in this case involves a narrow aspect of one of the more controversial current problems of public utility rate-making—how to compute the federal income tax expense in a company's cost of service where the company may have an option to adopt one of the rapid-depreciation methods permitted by Sections 167 and 168 of the Internal Revenue Code. See, *e.g.*, *El Paso Natural Gas Co.* v. *Federal Power Commission*, 281 F. 2d 567 (C.A. 5), certiorari denied *sub nom. California* v. *Federal Power Commission*, 366 U.S. 912; *Cities of Lexington, etc., Ky.* v. *Federal Power Comm.*, 295 F. 2d 109 (C.A. 4); *Panhandle Eastern Pipe Line Co.* v. *Federal Power Com-*

[8] $400,000 ÷ $192,769,091 = .002.

[8a] 27 FPC 542, lines 8, 13, and 18.

[8b] Jur. St., p. 19b.

*mission*, 316 F. 2d 659 (C.A.D.C.), certiorari denied, 375 U.S. 881; *Alabama-Tennessee Natural Gas Co.*, F.P.C. Opinion No. 417, Docket Nos. G–5471, *et al.*, issued Feb. 3, 1964. Specifically, the question here is whether the West Virginia Commission contravened the policy of the Revenue Code when it determined United Fuel's tax expense as though, contrary to fact, the company had elected to utilize the Guideline lives suggested by the Treasury in Revenue Procedure 62–21. Since the Guideline lives are considerably shorter than those presently used by the company, the effect of the Commission's action is to increase the depreciation deduction and thereby reduce the tax allowance in the company's cost of service. Although United Fuel advised the Commission that it had not yet decided whether to adopt the new procedure, the Commission held (Jur. St., p. 16b) that—

> The company has a duty to take advantage of all reasonable economies in the operation of its business and to pass on the savings therefrom to its customers. Since the record is devoid of any evidence showing that use of the new guideline rates would adversely affect United Fuel, the new depreciation rates will be used in computing the Company's income tax for inclusion in the cost of service.

United Fuel does not challenge the Commission's order on Fourteenth Amendment grounds. Its sole contention is that the order is repugnant to Section 167 of the Code in that it deprives the company of its statutory option to refrain from utilizing the new depreciation procedures made available by the Treasury.

We disagree with that contention: Nothing in the State Commission's order purports to control the tax returns filed or the taxes actually paid to the United States. The order merely computes rates as if the option to use the Guideline lives had been exercised. Nothing in the Treasury Regulation purports to give any options concerning the accounting methods used for the purposes of State rate regulation.

Nevertheless, we think that a federal question is raised because the State order appears to be based upon a misconstruction of the effect of the Treasury Regulation as a matter of federal law.

Revenue Procedure 62–21 is different from other forms of rapid depreciation permitted by Sections 167 and 168 of the Code. Pertinent portions of Section 167 permit larger deductions during the early years of the useful life of each plant unit than would be available under the conventional "straight-line" method of depreciation accounting, with resulting lesser percentages during later years. Section 168 permits deduction, in five equal annual installments, of investment in facilities certified as "emergency," thus writing off investment in those facilities much more rapidly than under "straight-line" accounting, with zero deductions during the remaining life of such facilities. Both of these techniques are freely available to all taxpayers without regard to their actual replacement practices. Where the Code provides such an option, it is in nowise inconsistent with the intent of Congress for a regulatory agency, State or federal, to require a public utility to take advantage of the

tax savings and pass them on to its rate-payers.[9] The mere fact that rapid depreciation procedures are not mandatory as a matter of federal tax law does not bespeak a congressional purpose to relieve taxpayers of their obligations under other federal statutes or under State law. In particular, there is no purpose to immunize public utilities from otherwise valid regulations requiring them to utilize available cost-savings opportunities.[10]

The Guideline lives, however, differ significantly from the liberalized depreciation methods referred to above in that they may be utilized, in the long run at least, only to the extent justified by the taxpayer's actual retirement practices. Thus, Revenue Procedure 62-21 expressly states that Jur. St., p. 6c)—

> A central objective of the new Procedure is to facilitate the adoption of depreciable lives

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[9] We express no view as to the wisdom of such action as a matter of regulatory policy.

[10] An analogy is found in the law of fiduciaries. Suppose, for example, that a testamentary trustee, operating a business on behalf of beneficiaries, elected not to claim rapid depreciation for tax purposes. The effect of that decision would be to forego a tax reduction in the short run, while avoiding a possible increase in future years when the assets are fully depreciated. The income beneficiaries might well complain that their interests had been improperly subordinated to those of the remaindermen, *i.e.*, that the trustee was obligated, under the terms of the will or under State law generally, to minimize taxes in the short run by claiming the maximum depreciation deduction. If the probate court, applying State law, were to order the trustee to adopt one of the rapid-depreciation methods permitted by the Revenue Code, no one would argue that the court's action was barred by the Supremacy Clause or that the trustee was somehow absolved of its fiduciary duty merely because the Revenue Code leaves the method of depreciation optional.

> even shorter than those set forth in the guidelines, or shorter than those currently in use, provided only that certain standards are met *and that subsequent replacement practices are reasonably consistent with the tax lives claimed.*

While taxpayers may adopt the new depreciation schedules without question by the Internal Revenue Service for a period of three years, the use of the Guidelines will not be accepted thereafter if it clearly appears that "the taxpayer's replacement practices do not conform with the depreciation claimed and are not even showing a trend in that direction" (Jur. St., pp. 6c–7c). The manifest purpose of the three-year grace period is to enable taxpayers to bring their retirement practices into conformity with the Guideline lives without losing the benefits of higher deprecation deductions in the interim. It was anticipated by the Treasury that the taxpayer who seeks the benefit of the new deprecation schedules will in fact be "moving toward a replacement practice consistent with the tax life used" (Jur. St., p. 12c). Neither Congress nor the Treasury intended, we believe, that a taxpayer whose current replacement practices do not warrant the use of the new depreciation schedules, and who has no intention of modifying these practices, should nonetheless claim the higher depreciation deduction during the three-year "honeymoon" period.

The West Virginia Commission apparently failed to take account of the conditional character of the option provided by the Treasury. The Commission did not so much as advert to the question whether the company's experience in retiring plant and equipment

entitled it to use the Guideline lives. Nor did it consider whether, if the Guideline lives were to be utilized, the company should be required to adjust its future retirement practices accordingly. On the contrary, pointing out that "[i]t is not unusual for industrial corporations, as well as public utility corporations, to charge on their books depreciation expense based on rates which are different from the rates permitted and used in computing their income tax liability" (Jur. St., p. 16b), the West Virginia Commission fully approved the depreciation rates currently used by the company on its books—rates which the evidence showed to be consistent with its actual retirement practices. Had the West Virginia Commission been cognizant of the conditional nature of the option offered by the Treasury, it would probably not have concluded that prudent management required United Fuel to claim a depreciation deduction which it would not be able to justify in the future and which was wholly out of line with the book depreciation approved by the Commission for rate-making purposes. At least, we presume, it would not have done so without an explicit discussion of the problem.

The Court need not decide in this proceeding whether a substantial federal question would be presented if, after reconsidering its determination in the light of a proper construction of the Guidelines, the West Virginia Commission were to insist that the Company take advantage of the three-year grace period. At the least, United Fuel would seem entitled to have that determination made on the basis of a correct view of federal law. Nor do we express any

view as to whether the Commission's action might be justified by United Fuel's failure, at the time of the hearing, to indicate whether it intended to utilize the Guideline lives, notwithstanding the company's statement of intention in its amended petition for rehearing. That question has been fully briefed by the parties and is not of concern to the government.

Respectfully submitted.

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